

RACQUET CLUB PROPERTIES, INC.
v.
ACTING SACRAMENTO AREA DIRECTOR, BUREAU OF INDIAN AFFAIRS

IBIA 93-68-A

Decided April 6, 1994

Appeal from the cancellation of a development lease.

Dismissed.

1. Indians: Leases and Permits: Negotiated Leases

Under 25 CFR 162.3 and 162.6(a), adult Indian owners of trust property have the authority to negotiate leases of that property, subject to the approval of the Secretary of the Interior.

2. Indians: Leases and Permits: Generally--Regulations: Publication

A person doing business on trust lands has the responsibility to familiarize himself with duly promulgated regulations governing his activities, and is deemed to have knowledge of regulations published in the Code of Federal Regulations.

3. Indians: Leases and Permits: Amendments--Indians: Leases and Permits: Negotiated Leases

Under the circumstances of this case, the Department of the Interior lacks authority to modify a lease of trust lands over the objections of the beneficial owners, or to order the owners to negotiate a new lease on the terms specified by the lessee.

APPEARANCES: Steve Dalby, its Vice-President, for appellant; Daniel G. Shillito, Esq., Office of the Field Solicitor, U.S. Department of the Interior, Palm Springs, California, for the Area Director.

OPINION BY CHIEF ADMINISTRATIVE JUDGE LYNN

Appellant Racquet Club Properties, Inc., seeks review of a March 8, 1993, decision of the Acting Sacramento Area Director, Bureau of Indian Affairs (Area Director; BIA), cancelling Lease No. PSL-235 on the Palm Springs Reservation. For the reasons discussed below, the Board of Indian Appeals (Board) dismisses this appeal for lack of authority to grant the relief requested.

On June 30, 1978, Cheryl Mae Saubel Miranda (now Dailey), Michael Dean Chormicle, and Cecile Roselle Miguel (now Ruiz) (allottees) 1/ entered into Lease No. PSL-235, Contract No. J53C1420-3562, with Desert Dorado, Inc. The lease covered Palm Springs Allotments PS-89, PS-100, and PS-114, which are located in sec. 2, T. 4 S., R. 4 E., San Bernardino Base and Meridian, Riverside County, California. Each allotment contains 20 acres, more or less. The lease had a 65-year term, beginning on July 25, 1978, the day it was approved by the Area Director.

On February 17, 1984, Desert Dorado, Inc., assigned all of its right, title, and interest in the lease to Dennis A. Martin and Helen Martin, who subsequently assigned the lease to appellant on December 15, 1989.

The purpose of the lease is set forth in Article 4, which originally required the start of construction of at least 60 single-family residences within two years of the date the lease was approved, *i.e.*, before July 25, 1978, and the start of construction of an additional 120 single-family residences by the end of the fourth year of the lease, *i.e.*, before July 25, 1980. As modified by Supplemental Agreement No. 5, dated June 3, 1987, Article 4 presently provides for the construction of 84 single-family residences on 20 acres of the leased property and of an additional 84 single-family residences and/or 192 condominium and/or apartment units on the second 20 acres. Under Supplemental Agreement No. 5, all construction was to be completed by July 25, 1992.

By letter dated July 30, 1991, 1-1/2 years after being assigned the lease and less than 1 year before construction was scheduled to be completed, appellant wrote BIA and requested an extension of time to complete construction. Citing the time necessary for the Department of Housing and Urban Development to rate the State bonds for the project, appellant asked that the construction completion deadline be extended until December 31, 1993.

On August 21, 1991, BIA informed appellant that it was appellant's responsibility to negotiate any lease modification with the allottees. On November 21, 1991, BIA again wrote appellant, stating that BIA had not received a response from appellant concerning the negotiation of an extension and noting that no construction had been started although the lease required that construction be completed by July 25, 1992.

Appellant responded by writing to the allottees on November 25, 1991, asking them for a 24-month extension, until July 25, 1994. Apparently after not receiving replies, appellant wrote the allottees again on December 20, 1991.

1/ On Apr. 2, 1986, Michael was issued fee simple Patent No. 04-86-0068 covering his allotment PS-100. This property is therefore no longer subject to BIA administration, and was removed from the lease in Supplemental Agreement No. 5, dated June 3, 1987.

In order to facilitate discussions, BIA held a meeting on February 11, 1992, involving appellant, the allottees, and BIA. Notes recorded by BIA at the time of that meeting indicated that neither of the allottees was interested in granting an extension of time without additional compensation, and that BIA told the allottees that if the lease were cancelled, Cheryl would get all of the income because the development that had been completed was on her allotment, and Cecile would only get her allotment back. The notes state that both allottees believed that was acceptable, with Cecile indicating that she believed she would be better off trying to get a new lessee for her allotment.

During spring and early summer 1992, although no extension of the construction deadline had been granted, appellant continued efforts to redesign the project, attempting to increase the number of apartment units to 433. Appellant indicated that it had met with Palm Springs City Planning Staff, and wanted phased construction with a construction completion deadline of December 31, 1994. By early June 1992, the City indicated that it would not approve the increased density. By late June, appellant informed BIA that it wanted an extension to begin construction by December 31, 1993, with a completion deadline of December 31, 1996.

By letter dated August 6, 1992, the Director, Palm Springs Field Office, BIA (Director), gave appellant notice that, by failing to even begin construction, appellant had breached Article 4 of the lease, which required the completion of construction by July 25, 1992. The Director stated that appellant had 60 days under Article 27 of the lease, Default, in which to cure the breach, and that if appellant could not reach agreement with the allottees within the 60-day period, BIA would proceed to cancel the lease.

Appellant responded by letter of August 12, 1992, stating that BIA was processing an amendment to the lease providing for an extension of the construction deadline. On October 26, 1992, appellant submitted a proposed Supplemental Agreement No. 6, which would extend the construction deadline until July 25, 1995.

BIA notes of telephone conversations with both allottees indicate that neither allottee wanted to extend the time for construction without additional compensation, and that both wanted the lease cancelled.

By letter dated December 23, 1992, BIA informed appellant that it was in violation of Article 4 of the lease; Article 5, Rentals; and Article 6, Payment of Rents. BIA stated that its records did not show full payment of rent to Cecile, and showed no proof of direct payments to Cheryl. ^{2/} The letter stated that appellant had 30 days to cure this monetary default under Article 27, and that unless payment and/or proof of payment and a satisfactory agreement for construction were presented within 30 days, cancellation proceedings would be initiated.

^{2/} It appears that the default in rental payments commenced in August 1992.

By letter dated January 25, 1993, without reference to BIA's letter of December 23, 1992, appellant submitted a second proposed Supplemental Agreement No. 6. This proposal provided for a construction completion deadline of December 31, 1997.

A note in the administrative record concerning a telephone conversation with appellant indicates that BIA informed appellant that no action would be taken on the proposal until all rentals were current. The response recorded by BIA was that appellant was having a cash flow problem and would not make payment. 3/

On February 4, 1993, the Director notified appellant that it was in violation of Article 4 of the lease by failure to complete construction by July 25, 1992. In accordance with 25 CFR 162.14, he gave appellant 10 days to show cause why the lease should not be cancelled.

Appellant responded by letter dated February 15, 1993, stating inter alia:

We intend to take the necessary corrective measures to correct this breach when we are granted an extension of construction time pursuant to the schedule as outlined in our proposed lease amendment. * * *

* * * [W]ithout some response to the repeated construction extension requests, it makes it impossible to continue with the lease payments on a property with no future value. Without the extension, all construction financing possibilities with our lenders are eliminated.

By granting the necessary extension, we will immediately pay all delinquent rent of approximately \$9,500 to [Cecile]. * * *

* * * [T]he * * * proposal * * * reflects a substantial increase of income to the lessors and protects them if the additional bonus density on the site is not granted by the city or the tribe. The loss of income to the lessors which will occur due to a default is sufficient cause to warrant not cancelling the lease and granting the extension needed to continue our work.

This is a project we want to build and have invested extraordinary amounts of time and money arriving to this point. We are proposing a "no lose" extension amendment to the lessors and hope you will carefully weigh the economic consequences to the lessors if this lease is cancelled.

(Letter at 1-2).

3/ Appellant contends that its recollection of its response was that it did not intend to make rental payments on a lease that had no future value without the requested extension.

The Director responded by letter dated February 18, 1993, stating: "As stated in our December 23, 1992 letter, we cannot and will not approve an extension to your construction time until rent was paid in full. Since you have not paid the rent your proposed Supplemental Agreement No. 6 for extension to construction deadline is not being considered. We continue to consider you in default of your lease and no further extension of time to cure these defaults will be granted" (Letter at 1).

In signed statements, both Cheryl and Cecile repeated their interest in having the lease cancelled. By letter dated March 8, 1993, the Area Director cancelled the lease, stating that delinquent rental in the amount of \$13,195 plus interest remained due.

Appellant appealed from this decision. Both appellant and the Area Director filed briefs on appeal.

Discussion and Conclusions

Appellant acknowledges that it did not complete construction by July 25, 1992. In essence, its argument is that this breach should be excused because it was working in good faith on reaching an agreement for an extension of the deadline and was misled by BIA's involvement in the negotiation process into believing that BIA was assisting in the negotiations with the intent of reaching agreement on an extension of time. Appellant cites BIA's alleged active involvement in the negotiation of an extension, through the actions of a former employee, and BIA's failure to furnish information and fulfill certain functions which appellant believes were BIA's responsibility.

The Area Director first argues, however, that this appeal should be dismissed because the Board lacks authority to grant the relief appellant requests. Appellant states that it

seeks relief from the order of cancellation by either having the Lease reinstated with the extension of time for construction as per proposed Supplement Number 6, or that a new lease be entered into as negotiated between Lessors and Lessee, reflecting an equitable time for construction of the amended project acceptable to Lessors and Lessee.

On January 25, 1993, Lessee sent a letter to * * * BIA * * * enclosing analyses of various scenarios, developing cash flow projections for the lessors. Scenario 3 is the proposal that Lessee is requesting be applied to the extension being requested. * * *.

Due to the BIA's lack of positive response to that proposal, Lessee requests the dates as submitted on January 25, 1993, be adjusted accordingly to reflect the date of the granting of the extension. For example, Lessee's proposed Scenario 3 would begin in December, 1995 with all subsequent dates advancing 7 months if the extension is granted in July, 1993.

Lessee continues to propose that payments that have not been made to Lessors from August and December of 1992 to date will be brought current, with interest, upon the granting of the extension.

(Opening Brief at 8-9).

[1] Appellant asks the Board to either approve proposed Supplemental Agreement No. 6, or order the allottees to negotiate a new lease which would include an extension of the construction completion deadline. This request evidences a basic misunderstanding of the Department's authority relative to the leasing of trust lands belonging to adult Indians, such as the allottees here. Regulations concerning the leasing of individually allotted lands are found in 25 CFR Part 162. Section 162.3 (1) provides that adults may lease their own lands. Section 162.6(a) provides that "[l]eases of individually owned land * * * may be negotiated by those owners * * * who may execute leases pursuant to § 162.3." Section 162.5(a) requires that "[a]ll leases made pursuant to the regulations in [Part 162] shall be in the form approved by the Secretary and subject to his written approval." Section 162.2, which sets forth the circumstances under which the Secretary may grant a lease on individually owned land, does not include any authorization for BIA to issue a lease under the circumstances of this case. 4/

[2] As a person doing business on Indian trust lands, appellant had the responsibility to familiarize itself with duly promulgated regulations governing its activities. Federal Crop Insurance Corp. v. Merrill, 332 U.S. 380 (1947); Danard House Information Services Division, Ltd. v. Sacramento Area Director, 25 IBIA 212, 218 (1994), and cases cited therein. Appellant is furthermore deemed to have knowledge of regulations published in the CFR. Blackhawk v. Billings Area Director, 24 IBIA 275, 280 (1993), and cases cited therein.

[3] Cheryl and Cecile are the sole beneficial owners of their own allotments. They are adults, and there is no evidence or allegation that they are either non compos mentis or have given BIA written authorization to lease their property. Under these circumstances, neither the Board nor

4/ Section 162.2 provides:

"(a) The Secretary may grant leases on individually owned land on behalf of: (1) Persons who are non compos mentis; (2) orphaned minors; (3) the undetermined heirs of a decedent's estate; (4) the heirs or devisees to individually owned land who have not been able to agree upon a lease during the three-month period immediately following the date on which a lease may be entered into; provided, that the land is not in use by any of the heirs or devisees; and (5) Indians who have given the Secretary written authorization to execute leases on their behalf.

"(b) The Secretary may grant leases on the individually owned land of an adult Indian whose whereabouts is unknown, on such terms as are necessary to protect and preserve such property.

"(c) The Secretary may grant permits on Government land."

the Department of the Interior has authority to modify the lease over the objections of Cheryl and Cecile. 5/ Nor does the Board or the Department have authority to order them to negotiate or enter into a new lease, even if BIA believed that appellant's proposal was in their best interests. 6/ See Moses v. Portland Area Director, 24 IBIA 233 (1993).

After reviewing the administrative record, the Board has no doubt that the allottees and BIA initially responded favorably to appellant's request for an extension of the construction completion deadline. It also has no doubt that both the allottees and BIA eventually lost patience with appellant's failure to present a consistent development plan and construction schedule, and unwillingness to offer any up-front compensation for the construction delay. 7/ Despite appellant's apparent belief to the contrary, the fact that the allottees were initially receptive to an extension did not require that they accede to whatever extension appellant ultimately proposed. The allottees had the authority to negotiate any modification of the lease of their property, and also had the authority not to agree to appellant's requested modification, especially when appellant was unwilling to agree to their conditions for an extension. Article 27 clearly provided that "[t]ime is of the essence of this lease." The fact that other extensions had been granted did not justify appellant's apparent belief that it was entitled to receive yet another extension.

The Board has previously noted that expectations that a lease would be negotiated or modified may "be defeated by changed circumstances" Idaho Mining Corp. v. Deputy Assistant Secretary - Indian Affairs (Operations), 11 IBIA 249, 262, 90 I.D. 329, 336 (1983); 8/ Metzger v. Acting Assistant Secretary - Indian Affairs (Operations), 13 IBIA 314, 318 (1985). The simple fact here is that after considering appellant's offer, neither of the allottees was interested in granting a further extension of the construction completion deadline on appellant's terms.

5/ Although appellant contends that at least one allottee was agreeable to an extension, written statements provided to BIA by both allottees show that, without compensation for the delay in construction, neither was willing to agree to an extension.

6/ BIA has stated that it does not believe appellant's proposal is in the allottees' best interests.

7/ Appellant contends that approval of proposed Supplemental Agreement No. 6 may result in a \$2,000,000 increase in income to the allottees over the life of the lease. This analysis is, however, contingent upon the occurrence of several other factors, and does not provide immediate compensation for the lack of income that the allottees would presently have been receiving had appellant completed construction as required under the lease.

Appellant has not disputed the statement in an affidavit attached to the Area Director's answer brief indicating that appellant rejected the request of one of the allottees for a payment of \$10,000 as consideration for a modification.

8/ Rev'd on other grounds, Wilson v. U.S. Department of the Interior, No. CV-R-83-350-BRT (D. Nev. Aug. 7, 1985); vacated and remanded, 799 F.2d 591 (9th Cir. 1986). See 15 IBIA 132, 94 I.D. 68 (1987).

In order to grant appellant the relief it requests, the Board would have to order BIA to modify the lease, despite the facts that appellant was unsuccessful in negotiating a modification with Cheryl and Cecile and that neither the allottees nor BIA believe the proposed modification is in their best interest, merely because appellant anticipated that an extension would be granted. Based upon the discussion above, the Board concludes that it lacks authority to order this relief, and consequently, the Area Director's motion to dismiss should be granted. 9/

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, this appeal from the Acting Sacramento Area Director's decision of March 8, 1993, is dismissed because the Board lacks authority to grant the relief requested.

Kathryn A. Lynn
Chief Administrative Judge

I concur:

Anita Vogt
Administrative Judge

9/ The Board notes that based upon its review of the administrative record and the parties' filings, had it reached the merits of this case, it would most likely have affirmed the cancellation of the lease. Contrary to appellant's several arguments alleging error by BIA, it appears that BIA properly discharged its responsibilities in this matter. Among other things, BIA was not required to provide appellant with additional opportunities to cure a default which it had stated it would not cure. See, e.g., Tiger Outdoor Advertising, Inc. v. Eastern Area Director, 22 IBIA 280, 288 (1992); Mast v. Aberdeen Area Director, 19 IBIA 96, 99 (1990).